Janus vs AFSCME

On February 27, 2018, The U.S. Supreme Court is scheduled to hear arguments in *Mark Janus v. American Federation of State, County, and Municipal Employees, Council 31* (AFSCME), a case that may prove to be one of the most impactful labor and employment cases in decades. At issue in *Janus* is whether public-sector fair-share fees are permitted under the First Amendment. Under longstanding labor law, any worker who is represented by a union may choose not to join the union or pay membership fees. The union, however, must represent all employees in the bargaining unit equally. Therefore, in twenty-two states, unions and public employers may negotiate as part of a collective bargaining agreement a provision that permits the collection of fair-share fees. These fees are calculated to cover the costs germane to collective bargaining, while allowing workers who benefit from the union's representation to opt out of paying any fees toward the union's social or political activities.

This balance was established in 1977 by the Supreme Court in *Abood v. Detroit Board of Education*,[1] and in *Janus*, the Supreme Court will decide whether to overturn that forty-one -year-old precedent and the line of cases that follow. Such a decision would greatly impact union finances, state and municipal management, and a host of workplace and corollary issues. This piece seeks to lay out the legal arguments made by both sides. Further, since *Janus* was accepted by the Supreme Court after being dismissed by lower courts before any trial, there is a scant record when compared to most cases heard by the Court, which typically have already been tried more than once. Therefore, the more than seventy amicus briefs, which provide a wide range of arguments and alternatives, may prove especially important.

How Did Janus Get to the Supreme Court?

Groups such as the National Right to Work Committee have been litigating the issue of whether fair-share fees violate the Constitution for decades. In fact, National Right to Work represented the petitioner in *Abood*. Over the last few years, however, Supreme Court Justice Alito has issued a string of stinging decisions that have laid the groundwork for overturning the Court's 1977 Abood precedent, which permitted fair-share fees in the public sector. Starting with *Knox v. SEIU* in 2012, Alito cast doubt on the Court's precedent regarding fair-share fees as having "recognized that such arrangements represent an 'impingement' on the First Amendment rights of nonmembers." In extensive dicta, Alito questioned the constitutionality of fair-share fees, as well as that of the opt-out regime (whereby objectors have to opt out, rather than having members opt in), and explained that the Supreme Court had never critically examined these issues. Alito essentially invited new First-Amendment challenges to the very issue of fair-share fees in the public sector.[2]

The National Right to Work Legal Defense Fund, which brought *Knox*, was paying attention. Two years later, they were before the Supreme Court again in *Harris v. Quinn*, a case involving home health care personal assistants.[3] This class of workers were excluded from coverage under the 1935 NLRA, and the case involved state laws that categorized them as public employees for the purpose of granting them union rights. The majority opinion in *Harris* held that these home health care workers in Illinois, and in every other state that had a similar program, are only "partial" or "quasi" public employees—as opposed to "full-fledged public employees." As such, the Court was unwilling to extend *Abood* to cover these workers. In paragraph after paragraph, Alito wrote that the *Abood* Court's "analysis is questionable," that it "seriously erred…fundamentally misunderstood…failed to appreciate…does not seem to have anticipated…did not foresee the practical problems…" and that "a critical pillar of the Abood Court's analysis rests on an unsupported empirical assumption." Alito was essentially begging for someone to petition the Court with a case that would allow the justices to address the First Amendment issues involved in fair share agreements.

In 2015, the Supreme Court accepted such a case in *Friedrichs v. CTA*.[4] Based on the cases leading up to *Friedrichs*, as well as the oral arguments, there was a general consensus that the Supreme Court was likely to impose "right to work" on all public-sector employees. Then Justice Antonin Scalia died unexpectedly on February 2016, and the Court issued a 4–4 decision on the case the following month.

Who Is Janus and What Is His Argument?

Mark Janus is a child support specialist who is represented by AFSCME, but has chosen not to join the union. As a result, instead of union dues, he is assessed a fair-share fee that is approximately 78 percent of the full union dues, which amounts to $23.48 per pay period. Janus is arguing that this fee constitutes a violation of his First Amendment rights for two reasons: (1) that collectively bargaining with a government employer is the same as lobbying the government, and (2) that fair-share fees are a form of compelled speech and association that deserves heightened constitutional scrutiny. Under this heightened scrutiny, Janus argues that the use of fair-share fees for the purposes of labor stability and discouraging free riders should be found to be unconstitutional.[5]

What Is AFSCME's Argument?

AFSCME argues that Janus fundamentally misunderstands the Framers' intent with regard to the First Amendment, how the Supreme Court has applied the First Amendment to the government as employer, and the nature of collective bargaining. AFSCME points out that "the Republic's first 150 years are replete with government curtailments of public employees' free-speech rights, including on issues of public concern." Following that history, the Supreme Court has articulated a more nuanced view of public employees' First Amendment rights, but has limited these rights to when the employee is speaking both as a citizen and on a matter of public concern. Furthermore, the Court has always balanced the employee's interests in speech with the government's interests, which was the same balance struck in *Abood*.

Collective bargaining largely concerns "bread-and-butter" employment issues, such as wages, benefits, working conditions, promotions, safety equipment, grievance procedures, holidays, grooming standards, meal periods, and the like. Much of the subject of collective bargaining is non-political and is therefore not in the realm of lobbying. Janus's approach would constitutionalize each of these matters and rob the government from making basic personnel decisions.[6]

What Are Some of the Major Arguments Supporting Janus?

- Four public school teachers represented by the anti-union Fairness Center argue against the free-rider rationale for fair-share fees. These teachers argue that they asked the union during the last round of contract negotiations not to bargain for increased wages because they were concerned with the school district's financial conditions. Furthermore, they believe that it is unfair that they pay low medical premiums. The teachers argue that these concerns were "immediately dismissed by union officials." Even though they had an opportunity to voice their concerns, these teachers argue that their First Amendment rights are violated when they have to pay for representation on matters they may disagree with.[7]

- Similarly, two public school teachers, one retired and the other active, represented by the Fairness Center argue that the process by which religious objectors can donate their fair-share fees to a non-religious charity of their choice in lieu of payment to the union is unfair. Specifically, they object to the union's policy of not allowing them to donate to political charities or to charities whose missions are inconsistent with the teachers' union's mission.[8]

- The 1851 Center for Constitutional Law doubles down on the lobbying argument made by Janus. It argues that collective bargaining is inherently political because much of it ultimately affects the government's use of resources. As such, requiring employees who are represented by the union to pay for collective bargaining activities violates their First Amendment rights.[9]

- Two employees of the Minnesota court system attempt to refute two of the rationales for allowing fair-share fees. First, they argue that unions will choose to be exclusive representatives with or without fair-share fees because it allows them to speak on behalf of all workers. Second, they argue that unions are not burdened by free riders because the costs they pose are outweighed by the union's benefit as exclusive representative.[10]

- The libertarian Freedom Foundation argued on behalf of two economists that their research shows that "right-to-work" states experience greater labor peace and fewer strikes than states that permit fair-share fees. In so arguing, they attempt to diminish the government's interest in permitting fair-share fees.[11]

- Two former general counsels to Illinois governors argue that public-sector collective bargaining "is political lobbying by another name." They highlight the state's dire financial straits and argue that much of it stems from the collective bargaining process.[12]

- The libertarian Buckeye Institute argues that unions do not need fair-share fees to survive. They argue that the experience in Indiana, Michigan, and Oklahoma shows that union membership can increase after the enactment of "right to work laws."[13]

- The Becket Fund for Religious Liberty coined the term "coercion laundering," and essentially argues that governments use unions as third parties to mask the source of their coercion.[14]

- The Claremont Institute's Center for Constitutional Jurisprudence argues that public-sector collective bargaining is a form of lobbying, and that it somehow limits the individual's right to lobby the government.[15]

- The Rutherford Institute argues that the requirement that an employee opt out of union membership is constitutionally impermissible, and instead employees should have to opt in (presumably, this does not include the opt-in inherent in a union election), because employees should not have to voice their dissent.[16]

- Twenty states argued that public-sector collective bargaining implicates matters of public concern, and likened the activity to lobbying. They then argued that collective bargaining led to municipal bankruptcies like the one in Detroit, Michigan.[17]

- The libertarian Cato Institute argues that stare decisis—the Court's principle that it will defer to its earlier precedents—is not a sufficient argument to let Abood stand and let fair-share fees remain. This is because at issue are constitutional rights, and the justification of labor peace that the Court has used is not a sufficiently compelling governmental interest to outweigh workers' First Amendment rights.[18]

What Are Some of the Major Arguments Supporting AFSMCE?

- The AFL-CIO argues that the compelled speech and association cases on which Janus relies are not applicable here because those cases involve instances where there is "direct government interference with individuals' self-expression, either by compelling them to convey a particular message or by compelling them to associate with others with whom they disagree in a way that affects their ability to convey their own message." Instead, the Court should look to its compelled-subsidy precedents, in which the government permissibly "mandates that individuals participate in an association for the purpose of advising the government on a program affecting those individuals." Examples of compelled subsidies include the requirement that lawyers join an integrated bar association and requirements that certain farmers join committees that advise the government.[19]
- Fifteen unions representing police officers, firefighters, and other public safety employees argue that eliminating fair-share fees could set in motion a union "death spiral," where membership will drop and as a result unions will have to raise dues, which will in turn lead to additional incentives to workers to not pay their dues. They further argue that Janus's representation of public-sector unions as a drag on government is inaccurate. Rather, "well-funded unions use the collective bargaining process to ensure safety, provide adequate training, and promote the cohesion among public safety employees essential to making split-second decisions under dangerous conditions."[20]

- Eighty-seven civil rights organizations argue that if the Supreme Court overrules Abood, then it would "undermine one of the most important vehicles for providing economic and professional opportunities for workers in the United States, and, in particular, for workers who are women and people of color." The public sector employs higher rates of women and people of color, and these jobs have "been a source of opportunity and dignity." Data shows that women and people of color who are represented by unions have greater pay equity, increased benefits, and access to additional avenues for civil rights protections. Unions provide these important features through the process of collective bargaining, which is funded by membership and fair-share fees. Eliminating fair-share fees would burden these workers and diminish a system that has proven to provide opportunity and a path to the middle class.[21]

- Two eminent libertarian legal scholars, Eugene Volokh and William Baude, argue that *Abood* was wrongly decided, but not because it overly impacted workers' First Amendment rights (as other libertarians have argued), but because there is no First Amendment right to be free from compelled subsidies. "Compelled subsidies of others' speech happen all the time, and are not generally viewed as burdening any First Amendment interest. The government collects and spends tax dollars, doles out grants and subsidies to private organizations that engage in speech, and even requires private parties to pay other private parties for speech-related services—like, for example, legal

representation." Volokh and Baude argue that once one gets past the erroneous First Amendment arguments, this is an "easy case." *Abood* should not be overturned simply because it may have been badly reasoned or contains some flaws. "The Court should overturn *Abood* only if, going back to first principles, it can establish that the Free Speech Clause does protect a right that is violated by fair-share fees. But the First Amendment provides no such right."[22]

- Labor law scholar Benjamin Sachs argues that fair-share fees are "pass-through" payments from employers through employees to a union, with the employee having no "genuine choice" over the fact of payment or amount. As such, these payments are attributed to the employer rather than the employee, and therefore do not constitute employee speech at all.[23]

- A group of labor law and labor relations professors argue that public employers must establish fair policies with uniform criteria in managing large workforces. In doing so, the government can either unilaterally implement policies or it can do so by collectively bargaining with employees. Collectively bargaining with employees' exclusive representatives allows the government to benefit from employee voice, which benefits all parties. If unions did not serve in this role, each employee would be forced to self-fund their own voice in communicating with public employers.[24]

- A group of workers at child-protection agencies across the country argue that collective bargaining has allowed them to implement policies, provide training, and fund projects that help them fulfill their mission of protecting vulnerable children. They refer to Janus's description of public-sector unions as a "caricature" of "pure-bred political animals that exist to extract fees from dissenters to fund highly politicized ideas they hate." In reality, public-sector unions provide a voice to workers in performing their jobs in an efficient and effective manner.[25]

- Labor law scholars Cynthia Estlund, Samuel Estreicher, Julius Getman, William Gould IV, Michael Harper, and Theodore St. Antoine argue that government employers utilize collective bargaining and permit fair-share fees because it has been shown to lead to reduced employee turnover, increased job satisfaction, and improved worker productivity. States have an important interest in ensuring that public-sector unions are funded such that they can provide this service and avoid the collective action problem that accompanies "right to work."[26]

- The ACLU argues that *Abood* struck the proper balance between protecting workers' First Amendment rights and the state's interests in properly managing its workforce by allowing workers to not join the union and pay only fair-share fees.[27]

- The U.S. Conference of Catholic Bishops argues that the Catholic Church supports workers' rights to unionize and bargain collectively, and it has long opposed "right to work" legislation because such laws weakens workers' rights. The Bishops argue that the Supreme Court should not hold that fair-share fees are a violation of the First Amendment, and should not issue any decision that could lay the groundwork for private-sector "right to work."[28]

- The Teamsters respond to Janus's claim that unions would work just as well without fair-share fees and their reliance on the federal government's "right to work" system. Because the federal system does not permit bargaining over wages or benefits, it does not serve as an appropriate comparison. Furthermore, approximately two-thirds of federal employees in bargaining units choose not to voluntarily pay union dues. The Teamsters argue that the Court should not overturn decades of precedent, and upset thousands of contracts, in a case where no record was developed that shows the real-world impact of fair-share fees.[29]

- The Fraternal Order of Police argues that collective bargaining of equipment, training, and community outreach saves police lives. Police are forbidden from striking, so they rely heavily on collective bargaining, and "right to work" would severely limit their abilities to do so.[30]

- Twenty-four past presidents of the D.C. Bar argue that if agency fees are struck down, a host of other cases requiring payments of fees would be in jeopardy. These include requirements that lawyers pay fees to an integrated bar association, that students pay fees for the extracurricular speech of other students, and that businesses pay fees for advertisements that support the industry as a whole.[31]

- A group of LGBT organizations argued that unions are essential to countering LGBT discrimination and ensuring equal treatment in the workplace. Through collective bargaining, unions have created effective anti-discrimination protections and grievance procedures. Any ruling which diminishes fair-share fees would starve unions of the resources they need to bargain and enforce such protections.[32]

- Twenty states and Washington, D.C., argue that states passed laws permitting collective bargaining and fair-share fees in response to paralyzing public-sector strikes and labor unrest. These laws have been successful in creating labor peace because states are able to tailor them to their individual needs. If the Supreme Court forbids fair-share fees, it would cause a serious disruption to the states that have chosen to follow this course of labor management.[33]

- A group of constitutional law scholars from Duke University School of Law, Georgetown University Law Center, North Carolina School of Law, and University of Chicago Law School argue that the Supreme Court rarely overrules one of its precedents, and has almost never done so in a divided manner. To overrule Abood in this case would create instability in the law, and disrupt the line of precedents analyzing public workers' constitutional rights.[34]

- The National Conference on Public Employee Retirement Systems argues that there is no causal relationship between collective bargaining and pension underfunding or municipal bankruptcy. Pension underfunding and municipal bankruptcies are the result of states' failure to make regular appropriate contributions, financial volatility, and a myriad of complex factors not associated with collective bargaining.[35]

- A group of leading economists (including three Nobel laureates) offer an explanation to the Court of the free rider problem that is well-accepted among economists and accurate of how individuals would act under a "right to work" system. "Unless ameliorated by fair-share fees, the free-rider problem will leave unions weaker than employees (union members and *nonmembers alike*) would choose. Where fair-share fees are eliminated, in so-called Right to Work ("RTW") jurisdictions, nonmembers' withholding of financial support does not imply antipathy to unions. Instead, it follows from individual self-interest and the collective nature of the benefits unions provide, even in the absence of any disagreement about those benefits. That is the essence of the free-rider problem."[36]

Arguing for Neither Side

- A group of corporate law professors from more than a dozen law schools highlight that the Court has often looked at the rights of corporate shareholders in determining the rights of employees represented by unions, but that these shareholders cannot obtain information on a corporation's political speech or any meaningful way to opt out. They argue that if the Court strikes down fair-share fees, it should not do so based on erroneous beliefs about the rights of individual investors.[37]

- Two eminent First Amendment law professors, Charles Fried and Robert Post, argue that Janus's understanding of public employees' First Amendment rights is flawed, but that AFSCME's arguments for the preservation of fair-share fees is similarly flawed. Instead, they argue that Justice Scalia's "statutory-duties test" from his 1991 concurrence in *Lehnert v. Ferris Faculty Assn.* should be adopted. Under that test, contributions to a public-sector union "can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining representative."[38]